

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's disability, if any?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant has suffered a fifteen and one-half percent (15.5%) permanent partial general disability to the body as a whole on a functional basis as a result of personal injury by accident arising out of and in the course of her employment with the respondent from April 1991 through June 18, 1991.

Claimant, a high-school dropout who later obtained her GED and attended several college courses, began working for Sheplers in their warehouse in October 1990 unloading trucks. In April 1991, she began experiencing hand cramps. On July 7, 1991, she informed the respondent of her symptoms and underwent conservative medical treatment including cortisone shots and arm casts. When conservative care failed, claimant underwent surgery on the right hand for carpal tunnel syndrome on September 25, 1991. Left hand surgery for carpal tunnel syndrome was followed shortly thereafter on October 30, 1991. On November 19, 1991, claimant was returned to work with restrictions which could not be met by the respondent. Claimant remained on temporary total disability compensation until December 9, 1991, at which time she was returned to work, half-days. Claimant was ultimately returned to work full-time, half day in the warehouse and half day doing paperwork for the respondent per the restrictions of Dr. Mark Melhorn.

Dr. Melhorn restricted claimant from lifting over 50 pounds on a single lift and not more than 25 pounds frequently. He further limited repetitive activities such as grasping, pushing, pulling, fine motor manipulation, and advised she use vibratory tools four hours per day or less. Dr. Melhorn assessed claimant nine and fifteen-hundredths percent (9.15%) permanent partial impairment to the right forearm and nine and fifteen-hundredths percent (9.15%) permanent partial impairment to the left forearm which, when combined, equals a ten percent (10%) impairment to the body as a whole on a functional basis. Dr. Melhorn found no justification for assessing an impairment to claimant's elbows or shoulders.

Claimant was examined by Dr. Ernest Schlachter, at the request of her attorney, on December 1, 1992. During the examination he found claimant's range of motion in her shoulders to be normal and opined claimant had a normal rotator cuff. Claimant's tinell's sign was normal at the elbow but positive at the wrist. Claimant had a positive left phalen's and a negative right phalen's with no sensory deficits or atrophy. X-rays of the shoulders, wrists and elbows were normal. Dr. Schlachter diagnosed bilateral carpal tunnel syndrome, epicondylitis bilaterally and overuse syndrome of the shoulders bilaterally. He assessed a fifteen percent (15%) permanent partial impairment to the body as a whole to the upper extremities which computes to a nine percent (9%) impairment to the body as a whole on a functional basis for the upper extremities. He also assessed three percent

(3%) permanent partial impairment to each shoulder which, when combined with the upper extremities, equates to a twenty-one percent (21%) permanent partial impairment to the body as a whole. He restricted the claimant from repetitive pushing, pulling, twisting or grasping, indicating a maximum of 30 times per hour and advised against the use of vibratory tools or working in a cold environment. He advised against claimant lifting more than 20 pounds on a single lift and 10 pounds repetitively. He also advised against work above claimant's shoulder level.

On cross-examination, Dr. Schlachter admitted the restrictions to claimant's shoulders were due to her tenderness and pain complaints as there were no objective findings on the physical examination. He also conceded that if he were to assess claimant's functional impairment on an objective basis, her impairment rating to the elbows and shoulders would be zero percent (0%).

Claimant advised Dr. Schlachter she terminated her employment due to her inability to tolerate the work. Claimant later admitted that on the date of the termination, she requested to take off work in order to accompany a friend to Kansas City. When this request was denied, claimant became angry and terminated her employment.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant was returned to work for the respondent in an accommodated position at a comparable wage. The Appeals Board finds that, based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such, claimant is limited to a functional impairment.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Melhorn, a board-certified orthopedic surgeon, opined the claimant's injury resulted in a nine and fifteen-hundredths percent (9.15%) permanent partial impairment of function to the right and left forearms which converts to a ten percent (10%) whole body impairment. Dr. Melhorn did not rate claimant's elbows or shoulders.

Dr. Schlachter, a general practitioner, did assess a functional impairment rating to claimant's elbows and shoulders based upon claimant's subjective complaints of tenderness and pain.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions upon which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

While the evidence is somewhat contradictory regarding the complaints alleged by claimant to her elbows and shoulders, the Appeals Board, in giving the claimant the benefit of the doubt, finds claimant has suffered some impairment to her elbows and shoulders as a result of the injuries suffered while employed with respondent. The Appeals Board finds claimant has suffered a fifteen and one-half percent (15.5%) permanent partial general body disability combining the ratings to the wrists, forearms, elbows and shoulders. This award does combine the ratings of Dr. Melhorn and Dr. Schlachter as the Appeals Board finds a split between the ratings of the two doctors accurately reflects claimant's resulting disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 21, 1994, is affirmed in all respects and that the claimant, Sherrie L. Richmond, shall be and is awarded compensation against the respondent, Sheplers Inc., and its insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained by a series of accidents up to June 18, 1991.

Claimant is entitled to 28.43 weeks of temporary total disability compensation at the rate of \$125.50 per week totalling \$3,567.97 followed thereafter by 386.57 weeks of permanent partial disability compensation at the rate of \$19.45 per week totalling \$7,518.79 for a 15.5% permanent partial general bodily disability, making a total award of \$11,086.76.

As of June 14, 1994, there would be due and owing to the claimant 28.43 weeks temporary total compensation at the rate of \$125.50 per week in the sum of \$3,567.97 plus 127.71 weeks permanent partial disability compensation at the rate of \$19.45 per week in the sum of \$2,483.96 which is ordered paid in one lump sum less any amounts previously paid. Followed thereafter by 258.86 weeks permanent partial general bodily disability at the rate of \$19.45 totalling \$5,034.83 until fully paid or until further order of the Director.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement.

Future medical benefits are awarded upon proper application to and approval by the Director of Workers Compensation.

The claimant's attorney fee contract is approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

Barber & Associates	
Transcript of preliminary hearing	\$60.30
Transcript of regular hearing	\$212.70
Harper & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$187.76
Deposition of Jerry D. Hardin	Unknown
Ireland Court Reporting	
Deposition of J. Mark Melhorn	\$159.20

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Shannon S. Krysl, Administrative Law Judge  
George Gomez, Director